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NO. 84-750

In the
Supreme Court of the United States

OCTOBER TERM, 1984

EASTERN AIR LINES, INC.,

PETITIONER

VERSUS

ERNEST GLENN WINBOURNE,

RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI

MANUEL A. FERNANDEZ
G. FREDERICK SEEMAN
1310 E. Judge Perez Drive
Chalmette, Louisiana 70043
Telephone: (504) 277-7531

Attorneys for Respondent,
Ernest Glenn Winbourne

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Respondent, Ernest Glenn Winbourne, respectfully prays that the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered on August 9, 1984, be denied.

STATEMENT OF THE CASE

On June 24, 1974, Eastern Air Lines Flight 66 crashed on its approach to Kennedy International Airport. Among the passengers killed in the crash were the wife and two young daughters of Ernest Glenn Winbourne. The

Winbournes were internationally ticketed passengers, and as such, subject to the provisions of the Warsaw Convention, as modified by the Montreal Agreement.

Mr. Winbourne filed suit against Eastern Air Lines and the United States of America on August 25, 1975, for the wrongful deaths of his family.

By consolidation order of the Multi-District Litigation Panel, the case was transferred to the Eastern District of New York for trial on the issue of liability.

Days prior to the trial on the issue of liability, the United States consented to the entry of a judgment imposing liability against it in all passenger cases. On September 18, 1978, the day of trial, Winbourne moved to sever his case from the liability trial and further moved for entry of judgment of liability against Eastern on the basis of the Warsaw Convention, as modified by the Montreal Agreement.

Over the specific objection of Eastern, Judge Bramwell granted plaintiff's motions. Eastern appealed the judgment imposing liability under Warsaw/Montreal. Notwithstanding the appeal, Judge Bramwell remanded the cases, including the instant matter, to the United States District Court for the Eastern District of Louisiana for trial on the issue of damages. Eastern filed a motion to stay the transfer pursuant to 28 U.S.C. 1404(a).

On January 16, 1979, the United States Court of Appeals for the Second Circuit denied Eastern's motion and the appeal was remanded to the United States District Court for the Eastern District of New York to consider the question of certification pursuant to 28 U.S.C. 1292(b).

On February 9, 1979, plaintiff noticed a motion for an order amending the judgment entered on September 28, 1978. Once again, Eastern opposed plaintiff's motion; however, by order dated June 1, 1979, Judge Bramwell granted plaintiff's request for a reaffirmation of the grant of liability based on Warsaw/Montreal and of the resultant judgment of liability against Eastern.

The parties stipulated to a remand of the case from the United States District Court for the Eastern District of New York to the United States District Court for the Eastern District of Louisiana. The record was thereafter transferred on June 3, 1981.

The terms of Warsaw/Montreal were held applicable by Judge Collins on March 31, 1982.

On April 5, 1982, the court granted Winbourne's motion for summary judgment on the issue of liability, and ordered Eastern to pay interest on the Warsaw judgment.

At this juncture, Eastern chose to deposit \$225,000.00, the principal amount of their liability under Warsaw/Montreal, into the Registry of the Court.

Trial on the issue of damages commenced on May 17, 1982, with Judgment being entered on January 24, 1983. Eastern's liability was held to be \$225,000.00, plus interest from date of judicial demand and costs.

The United States Court of Appeals for the Fifth Circuit affirmed the award of interest on the \$75,000.00 per seat Warsaw/Montreal limitation, citing *Domangue v. Eastern Air Lines, Inc.*, 722 F.2d 256 (5th Cir. 1984).

The United States Court of Appeals for the Second Circuit has recently held in *O'Rourke v. Eastern Air Lines, Inc.*, 730 F.2d 842 (2nd Cir. 1984), that prejudgment interest may not be awarded over and above the Warsaw/Montreal limitation.

On October 1, 1984, this Court granted Eastern's Petition for Writ of Certiorari in *Eastern Air Lines, Inc. v. Robert F. Mahfoud, Etc.*, (No. 83-4315, 5th Cir. 1984), cert. granted, 53 U.S.L.W. 3235 (No. 83-1807, U.S. October 1, 1984). In *Mahfoud*, the United States Court of Appeals for the Fifth Circuit ruled that Warsaw/Montreal does not preclude the award of prejudgment interest over and above the limits set forth therein, if certain equitable considerations are met.

REASONS FOR DENYING THE WRIT

Petitioner herein reasons that a conflict between a decision by the United States Court of Appeals for the Fifth Circuit and a decision by the United States Court of Appeals for the Second Circuit compels the issuance of a writ to resolve the question of whether a court may impose interest on a Warsaw/Montreal judgment.

In *Domangue v. Eastern Air Lines, Inc.*, 722 F.2d 256 (5th Cir. 1984), the Fifth Circuit established that post-judgment and pre-judgment interest may properly be awarded in addition to the \$75,000.00 limitation on judgments contained in the Warsaw Convention, as modified by the Montreal Agreement.

The Fifth Circuit, relying on *Domangue*, affirmed the District Court award of interest on a Warsaw/Montreal judgment in *Winbourne v. Eastern Air Lines, Inc.*, 83-3109

(5th Cir. 1984). Petitioner asserts that *Winbourne* is in direct conflict with the Second Circuit decision in *O'Rourke v. Eastern Air Lines, Inc.*, 730 F.2d 842 (2nd Cir. 1984), however, these decisions are readily distinguishable.

In *O'Rourke*, the Public Administrator sought an award of interest on the \$75,000.00 damage award received from Eastern pursuant to New York state law. Citing *O'Rourke*, at footnote 20, page A-30, it was stated that:

"the instant case...differs significantly from *Domangue*. Here the plaintiff seeks an award of pre-judgment interest pursuant to state law. As we noted, and as the Fifth Circuit acknowledged, this is contrary to one of the major objectives of the Convention, namely the establishment of a 'uniform body of world-wide liability' rules."

The plaintiffs in *Domangue* and *Winbourne*, as opposed to the Public Administrator in *O'Rourke*, were awarded interest over and above \$75,000.00 limitation, pursuant to Warsaw/Montreal, not state law.

Domangue and its progeny awarded pre-judgment and post-judgment interest based upon a determination that—

"allowing such interest does not defeat the objective of establishing a limit to liability so that air carriers may find companies to insure them, since air carriers may avoid significant interest charges by delaying the disposition of claims."

Domangue, 722 F.2d 256.

The drafters of the Warsaw Convention, over one-

half century ago, and the Montreal Agreement intended to protect fledgling air lines from potential ruin as a result of an international air disaster. In exchange for this considerable concession, passengers were to be the beneficiaries of a contract imposing absolute liability on air carriers.

The Montreal Agreement which raised the limits of liability is not a treaty among nations, but an agreement prepared by representatives of various air lines, including Eastern. This Agreement is silent on the issue of interest. Eastern Air Lines' failure to make specific inclusion of interest within the stated limitation of recovery should not be construed so as to preclude recovery of said interest by Winbourne.

In *Eck v. United Arab Air Lines, Inc.*, (1966 CA2 NY) 360 F.2d 804, 9 CCH Avi 18146, quoted with approval in *Reed v. Wiser*, (1977, CA2 NY) 555 F.2d 1079, 14 CCH Avi 17841, the court wrote:

"A court faced with this problem of interpretation, or another problem like it, can well begin with an inquiry into the purpose of the provision that requires interpretation. The language of the provision that is to be interpreted is, of course, highly relevant to this inquiry but it should never become a 'verbal prison'. The injury may lead the court to conclude that the provision only imperfectly manifests its purpose."

In determining whether an award of interest is permitted under Warsaw/Montreal, the *Domangue* and *Winbourne* Courts balanced the objective of maintaining a fixed and definite level of liability with the objectives of encouraging speedy compensation for damages sustained and

maximum recovery for victims. *Domangue*, 722 F.2d 256 at 263.

Equity was a paramount consideration of the Fifth Circuit in imposing interest against Eastern.

Judge Pratt aptly addressed the equity issue in his dissent from the disposition of plaintiff's cross appeal in *O'Rourke*, wherein the plaintiff was denied pre-judgment interest:

"Since Eastern was clearly and absolutely liable to pay plaintiff the \$75,000.00 (per seat) from the moment of death, interest on that sum earned during the legal proceedings required to compel its payment should accrue to plaintiff not Eastern. Air Line defendants and their insurers should not have an incentive to use the litigation process in order to reduce costs by delaying payment of monies clearly due and owing."

O'Rourke, (citation omitted)

Utilizing Louisiana's rates of legal interest during the course of this litigation, rates which have proven to be significantly below market, Winbourne's \$75,000.00 per seat recovery (\$225,000.00) would have earned interest in the following amounts:

October 5, 1975, (date suit was filed) until September 11, 1980, at 7%	\$ 77,962.70
September 11, 1980, until September 11, 1981, at 10%	\$ 22,500.00

September 11, 1981, until May 2, 1982, (\$225,000.00 deposited into the registry of the Court) at 12%	<u>\$ 26,778.00</u>
TOTAL	\$127,240.50

Stated differently, if Eastern would have invested the \$225,000.00 in its possession from October 5, 1975, to May 2, 1982, at the judicial interest rates stated above, the \$225,000.00 for which Eastern was absolutely liable under Warsaw/Montreal would effectively cost the air line \$97,759.50. Presumably Eastern had what was, in effect, Mr. Winbourne's money invested at considerably higher rates for the approximately 6½ years prior to its deposit into the Registry of the Court.

The decisions of the Fifth Circuit cited herein do not violate, but advance the objectives of the Warsaw Convention, as modified by the Montreal Agreement, that being to place a ceiling on the amount of damages recoverable from an air carrier. In its discretion, the Court considered the length of time between the tort and judgment and whether the defendant caused or contributed to any delay.

Considering the delays occasioned by Eastern in the *Winbourne* litigation, Judge Collins, in his reasons for granting plaintiff's Motion for Summary Judgment, stated as follows:

"The court has concluded that it would be manifestly unjust to deny the plaintiff an award of pre-judgment or post-judgment interest now that the litigation has finally drawn to a close almost 6 years from the crash of Eastern Air Lines Flight 66."

Winbourne, Record below at p. 644.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

MANUEL A. FERNANDEZ
G. FREDERICK SEEMAN
Attorneys for Respondent,
Ernest Glenn Winbcurne